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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED RETAIL WORKERS UNION, LOCAL 881,
CHARTERED BY THE UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND
MAY DEPARTMENT STORES CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Court of Appeals in this case upheld the National Labor Relations Board's rule announced in *Amoco Production Co.*, 262 NLRB 1240 (1982), which permits an employer whose employees are represented by an independent union to cease bargaining with that union if the independent affiliates with an international union unless non-members are permitted to vote in the independent union's internal affiliation election. Thereafter in *NLRB* v. *Financial Institution Employees*, —— U.S. —— (No. 84-1493, Feb. 26, 1986), this Court held that the NLRB "exceeded its authority under the Act" in adopting the *Amoco* rule. The question presented here, therefore, is:

> Should the decision of the court below be vacated and remanded for reconsideration in light of this Court's subsequent decision in *NLRB v. Financial Institution Employees?*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Retail Workers Union Local 881 petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to enable this Court to review the Seventh Circuit's decision and judgment in *United Retail Workers Local 881* v. *NLRB*, C.A. 7, No. 84-2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is reprinted in the Appendix to this petition at App. 1a-27a. The decision of the National Labor Relations Board is reported at 268 NLRB 979 and is reprinted at App. 28a-34a.

JURISDICTION

The decision of the Court of Appeals was rendered on October 1, 1985. On December 15, 1985, Justice Stevens entered an order extending the time for filing this peti-

tion to and including February 28, 1966. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved here are reprinted in Appendix D to this Petition, App. 36a-37a.

STATEMENT OF THE CASE

Statement of Facts

Until November, 1981, the United Retail Workers Union ("URW") was an independent national union composed of approximately 20,000 members divided into four local unions in two states. URW represented employees of eleven employers in separate bargaining units; URW bargained for and administered a collective bargaining agreement for each unit.

Among the units represented by URW in 1981 was a unit composed of employees of the respondent May Department Stores at its ten Chicago locations and a second unit of May's employees at its Decatur, Illinois store. The two units combined covered 1,292 employees. Pursuant to a valid union security clause in the URW-May collective bargaining agreements, all bargaining-unit employees, other than those who were only probationary employees, were members of the URW. As of July, 1981, of May's 1,292 bargaining unit employees, only 78 were probationary employees and not members of the URW.

In the Spring of 1981, the elected officers of URW—acting pursuant to an authorization from the elected presidents of the four URW locals—negotiated a merger agreement with the United Food and Commercial Workers International Union ("UFCW"). Under that agreement, URW would, as URW Local 891, become a "union within a union," retaining its name and autonomy. Thus, URW Local 881 would negotiate and ratify its own collective bargaining agreements, elect its own officers,

manage its own finances, and continue its own special programs and benefits.

In July, 1981, URW conducted a referendum on whether to ratify the merger agreement. Prior to that vote a special conference was held for all union stewards to explain the agreement and special merger meetings were held for all employees represented by URW. Ballots were then mailed to all URW members and to those probationary employees in bargaining units who would complete their probationary period by July 31, 1981 (the date the balloting was to begin) and who had applied for URW membership as of July 10, 1981 (when the ballots were mailed). In all, ballots were mailed to 20,458 of the 22,412 employees URW represented, including 1,214 of the 1,292 May employees represented by URW.

By a vote of 6,823 to 2,344—nearly 3 to 1—the URW members voted in favor of the merger. Pursuant to this overwhelming mandate of the URW members, the merger agreement was signed on October 19, 1981 by URW's officers, and became effective November 1, 1981. URW Local 881 assumed all the property and obligations of URW and continued to operate out of the same offices as had URW. The officers and members of the Board of Governors continued to govern URW Local 881 as its officers and General Executive Board, and the dues charged by URW continued unchanged after the merger.

On September 24, 1981, following the merger referendum, Fred Burki, National Executive Director of URW, wrote a letter formally advising May of the merger, including the final vote totals. Mr. Burki explained in detail the limited impact of the merger:

> 1. On November 1, 1981, the URW will become United Retail Workers Union Local No. 881, affiliated with the United Food and Commercial Workers International Union. At that time there will be no change in the officers of the URW or in its organizational structure. The present leadership in the URW

will remain in office, by virtue of the affiliation vote, for a period of three years. After three years, an election of officers will be conducted under nomination and secret ballot procedures set out in the Landrum-Griffin Act.

2. As a local of the UFCW, the URW will remain independent and autonomous. It will elect its own officers and select its own stewards. The URW will continue to make all decisions regarding collective bargaining, grievance handling and arbitration. There will be no change in current collective bargaining agreements. Contract ratification procedures will remain the same; members affected by an agreement will continue to take part in a ratification vote. Negotiation committees will be selected by the URW in accordance with its long-standing procedures.

In response to the Union's letter, May announced that effective upon the date of the merger, May would no longer abide by its collective bargaining agreements with URW, process grievances submitted by URW, transmit dues and initiation fees to URW or otherwise recognize the Union as the representative of May's employees. May purported to take this action because of what it claimed were "substantial differences between an independent [URW] and [its] new identity as a local of the [UFCW]" and a lack of a "clear mandate by [URW] membership for affiliation."

Prior Proceedings

After receiving May's letter, URW filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board") alleging that May had violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) ("NLRA" or "the Act"), by ceasing to abide by its collective bargaining agreements and by withdrawing recognition from, and refusing to bargain with, the Union. On December 13, 1981, following an investigation, the General Counsel issued a complaint against May.

On April 23, 1982, the case was transferred to the Board upon the parties' agreement to stipulate the facts and waive an oral hearing. Almost two years later, on February 17, 1984, the Board issued its Decision and Order. After a brief summary of the facts, the Board provided a legal analysis which reads in its totality as follows:

> We find merit in Respondent's contentions that the election herein was conducted with insufficient due process safeguards. As announced in *Amoco Production Co.*, 262 NLRB 1240 (1982), a critical element of an affiliation election is that all unit employees, whether unit members or not, be permitted to participate and vote in the affiliation election. Because, in this case, all unit employees have not been accorded these rights, we find that the affiliation was improper. Respondent, therefore, did not violate Section 8(a)(5) and (1) of the Act when it refused to bargain with United Retail Workers Union Local 881, chartered by United Food and Commercial Workers Union, AFL-CIO, CLC and refused to comply with the provisions of the collective bargaining agreements noted herein in effect with United Retail Workers Union, as they would apply to Local No. 881. [App. 33a-34a]

URW petitioned the United States Court of Appeals for the Seventh Circuit for review of the NLRB's decision and order. On October 1, 1985, that court rendered an opinion sustaining the NLRB's decision and dismissing the petition for review.

REASONS FOR GRANTING THE PETITION

The question presented by this case was stated by the lower court as follows:

> The issue on appeal is whether it was a permissible construction of the National Labor Relations Act . . . for the Board to hold that the Employer had no duty to bargain with the post-merger union be-

> cause the URW had excluded from the merger vote those employees in the bargaining unit who were not members of the UFW. [App. 2a.]

That court acknowledged that this question is one on which "two federal courts of appeals . . . have split," and that "the Supreme Court has granted certiorari in one of the cases." App. 2a.

On February 26, 1986, this Court decided the case to which the court below referred, *NLRB v. Financial Institution Employees*, ——, U.S. —— (No. 84-1493). This Court there "h[e]ld that the Board exceeded its authority under the Act in requiring that non-union employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." Slip op. at 16. The *Financial Employees* Court rejected the Board's contention that requiring non-members to vote in affiliation elections is necessary to protect the right of such individuals to select a bargaining representative, concluding that "the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status" and that "the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes." Slip op. at 11. And this Court likewise rejected the Board's contention that requiring a vote of all unit employees on affiliation issues would promote industrial stability as the Court found that "[t]he Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation." Slip op. at 16.

The decision below, which sustains the NLRB's rule requiring that non-members be accorded the right to vote in internal union affiliation elections is directly contrary to this Court's decision in *Financial Employees*. Accordingly, the Seventh Circuit's decision herein should be

summarily reversed and the case remanded to that court for further proceedings consistent with this Court's *Financial Employees* decision.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari in this case, vacate the judgment below, and remand the case for reconsideration in light of this Court's decision in *NLRB* v. *Financial Institution Employees*, —— U.S. —— (No. 84-1493; Feb. 26, 1986).

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF APPEALS
SEVENTH CIRCUIT
(CHICAGO)

No. 84-2000

UNITED RETAIL WORKERS UNION LOCAL 881,
CHARTERED BY UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION,
AFL-CIO

v.

NATIONAL LABOR RELATIONS BOARD,
and MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION,
Intervenor-Respondent

October 1, 1985

Before BAUER and ESCHBACH, Circuit Judges, and PELL, Senior Circuit Judge.

PELL, Senior Circuit Judge: Petitioner, United Retail Workers Union Local 881, petitions this court to review an order of the National Labor Relations Board (the Board), which held that the employer, May Department Stores (the Employer) did not commit an unfair labor practice by refusing to bargain with petitioner. Petitioner is the entity created by a merger agreement between the United Retail Workers Union (URW) and the United Food and Commercial Workers International

Union (UFCW). The Employer's refusal to bargain followed a vote by the URW members of the bargaining unit to merge with the UFCW. Bargaining unit employees who were not members of the URW could not vote in the merger election.

The issue on appeal is whether it was a permissible construction of the National Labor Relations Act (the Act) for the Board to hold that the Employer had no duty to bargain with the post-merger union because the URW had excluded from the merger vote those employees in the bargaining unit who were not members of the URW. The two federal courts of appeals that have addressed the Board's rule in the context of an affiliation election have split on the issue, *compare Financial Institution Employees, Local No. 1182 v. N.L.R.B.*, 752 F.2d 356, 116 LRRM 3409 (9th Cir. 1984), *cert. granted*, 105 S.Ct. 2318 (1985), *with Local Union No. 4-14, Oil Workers International Union v. N.L.R.B.*, 721 F.2d 150, 114 LRRM 3676 (5th Cir. 1983), and, as noted, the Supreme Court has granted certiorari in one of the cases.

I. THE FACTS

The parties are in complete agreement about the facts. Prior to November 1, 1982, the URW was a national independent union, with four local units and approximately 20,500 members. In total, the URW represented 22,400 employees of eleven different employers. In other words, just less than 2,000 of the represented employees were not union members. Two of the four local units consisted solely of stores owned by the Employer. The two locals represented 1,292 employees, of whom seventy-eight were not union members. The collective bargaining agreement between the URW and the Employer contained a union security clause; thus, all employees had to become union members within thirty-one days after their employment began.

Negotiations for a merger agreement between the URW and the UFCW began in 1981. According to the Agreement and Resolution of the two organizations, petitioner would retain the "United Retail Workers" name, manage its own finances, negotiate and ratify its own contract, elect its own officers, and continue its own special programs and benefits. At the same time, however, petitioner would be subject to the UCFW constitution. Furthermore, four non-independent administrative districts within petitioner's organization would replace the four local URW units, with election of officers on an at-large basis and not solely within each unit. All active URW members and all those who would finish their probationary period and apply for membership before the election date were eligible to vote in the election.

The URW then mailed to each member, but not to nonunion employees, a copy of the merger agreement, a ballot, and a notice of meeting. A number of merger meetings occurred, from which the URW did not exclude nonunion employees. The URW sent out 20,548 ballots. Of the 9,235 members who voted, 6,823 favored the merger, and 2,344 opposed it. The URW did not apportion the vote totals among the four local units. After the election, the URW and UFCW signed the merger agreement. In a letter, an officer of the URW informed the Employer that the post-election entity, although affiliated with the UCFW, would undergo no change in officers or organizational structure and would remain independent and autonomous with respect to collective bargaining, grievances, and arbitration. Petitioner would also maintain the URW's contract-ratification procedures.

Thereafter, the Employer refused to recognize petitioner and refused to abide by its collective bargaining agreement with the URW, which did not expire for nearly eighteen more months. The other employers of URW members did not take similar action. In withdrawing recognition, the Employer relied upon the URW's ex-

clusion of nonmembers from the merger vote and the failure of the URW to provide unit-by-unit election results so that the Employer could ascertain whether a majority of its union employees favored the merger.

Petitioner then filed unfair labor practice charges against the Employer, alleging violations of sections 8(a)(5) and 8(a)(1) of the Act. 29 U.S.C. § 158(a)(5) and (1). The Board held, in accord with its decision in *Amoco Production Co.*, 262 NLRB 1240, 110 LRRM 1419 (1982), *see* Part II, *infra*, that the exclusion of nonmembers from the election rendered the merger improper for lack of sufficient due process safeguards. *May Department Stores Co.*, 268 NLRB 979, 115 LRRM 1136 (1984). Therefore, the Board concluded that the Employer did not violate the Act by refusing to bargain with petitioner and by refusing to honor the existing contract.

Petitioner filed a timely appeal. Despite the fact that the present case involves a merger, petitioner does not attempt to escape the application of *Amoco*, which involved an affiliation, upon the basis of any factual distinction. Instead, petitioner maintains that two independent reasons mandate the rejection of *Amoco*. First, petitioner argues the Board's already existing rule—that an employer need not bargain with a post-election union unless the union is merely a continuation of the old union with a new name and not a substantially different organization—adequately protects employees' representational interests. Thus, petitioner asserts the nonmember voting rule is "invalid as an entirely gratuitous interference with internal union affairs." Petitioner asserts that the merger is an internal union affair, effectively indistinguishable from other matters such as strike votes and contract ratifications, from which, the Board has held, unions may exclude nonmembers' participation.

Second, petitioner claims that, because the numerical outcome could not have changed even had all nonmember employees voted against the merger, the Board's own out-

come determinative rule for Board-conducted representation elections should apply. Under the "outcome determinative" rule, mandated by the Landrum-Griffin Act, 19 U.S.C. § 482(c) the Board will not overturn a representation election unless it determines that an election without improprieties would have resulted in a different outcome. Petitioner maintains that the same rule should apply here because merger elections are, in a sense, substitutes for representation elections. Finally, petitioner claims that *Amoco* is internally inconsistent. Petitioner points out that the rule requires a union to allow all unit employees to vote in a merger election, just as in a representation election, because both types of elections implicate the same employee rights. Simultaneously, however, the Board refuses to apply the outcome determinative test to the merger context, somehow differentiating between merger elections and representation elections.

In contrast to petitioner's position, the Board contends that its *Amoco* rule is a permissible construction of the Act, consistent with the Act's fundamental guarantees. The Board maintains that the *Amoco* rule strikes a reasonable balance of the conflicting legitimate interests at stake. Therefore, in light of the broad deference due to the Board's determinations, the Board contends that we must deny the petition.

II. THE HISTORY OF THE *AMOCO* RULE

In 1975, the Board, by a vote of two-to-one, adopted an administrative law judge's recommended order requiring Amoco Production Company to recognize and bargain with a union and to cease and desist from certain unfair labor practices. *Amoco Production Co.*, 220 N.L.R.B. 861, 90 LRRM 1434 (1975). The originally independent, Board-certified union voted to affiliate with an international. No non-union employees in the bargaining unit could vote in the election, although union organizers permitted them to participate in the discussions concerning

the election and informed them that they could vote merely by becoming union members. Of the 480 employees in the unit, 383 received ballots. By a vote of 214-71, the employees voted in favor of affiliation. Thus, the margin of victory for the affiliation, 143 votes, was greater than the number of nonunion employees who were ineligible to vote, of which three were ninety-seven. Nevertheless, the company refused to recognize petitioner and repudiated the collective bargaining agreement.

The Board held the company to its contract, relying upon the fact that participation by the non-union employees would not have altered the result. Id. at 864. The Board further noted that there was neither any procedural challenge to the manner in which the union ran the actual voting nor any employee complaints concerning the affiliation. Id. The Board found that the international was the successor to the independent and held that the change in affiliation did not relieve the company of its bargaining obligation. The Board also observed that, if it voided the merger election, the employees would have no union representation at all because the independent had ceased to exist after affiliation. Id. at 865.

The dissent maintained that the entire electoral process was fundamentally flawed because the "essence of democracy" is to give an opportunity to participate to all people affected by an electoral decision. Id. at 862 (Member Jenkins, dissenting). The dissent also rejected the majority's reliance upon the fact that there was an insufficient number of non-union employees to change the result of the election.

> Exclusion of some of this electorate from the right to vote inhibits their participation in the electoral process, a participation which, through discussion and interchange of views may affect the attitudes and votes of others who are permitted to vote. Thus

> the effects of the exclusion cannot be measured by a mere numerical tally.

Id.

The company then appealed to the United States Court of Appeals for the Fifth Circuit. In the meantime, however, the Board changed its position with respect to affiliation elections and required unions to allow all unit members to vote before the Board would amend the union's certification as bargaining representative. *Jasper Seating Co.*, 231 NLRB 1025, 96 LRRM 1195 (1977). Consequently, the Board requested the Fifth Circuit to remand the *Amoco* case to the Board for further consideration. By a three-to-two vote, the Board then affirmed its earlier *Amoco* decision, reversing *Jasper Seating Co.* and holding, for two reasons, that an affiliation vote limited to union members does not relieve an employer from its duty to bargain with a certified union. *Amoco Production Co.*, 239 NLRB 1195, 100 LRRM 1127 (1979). First, the Board declared that an affiliation is basically an internal union affair. The Board stated that an affiliation "does not create a new organization, nor does it result in the dissolution of an already existing organization." Id. The Board also noted that there were a variety of reasons why an employee might favor affiliation and that only union members would be subject to any new constitution imposed by the new parent union. Id. at 1195 & n.4. The Board emphasized that a decision to affiliate does not alter the existing collective bargaining agreement. Id. at 1195. Consequently, the Board concluded, affiliation election procedures are internal union matters over which the Board has no authority, provided that the election procedures otherwise satisfy basic due process requirements.

The second rationale for the Board's decision relied upon the fact that nonmembers sufficiently concerned about an affiliation election could simply join the union to participate in the vote. Id. In that respect, affiliations

do not differ from other internal matters, such as strike votes, contract ratification, and the election of union officers, stewards, and negotiators, in all of which cases the Board has allowed exclusion of nonmembers. The Board also identified the following facts as important: no employee complained about the election procedures or disputed the results; the bylaws, of which all employees were aware when deciding where to join the union, explicitly limited the ability to vote to union employees; and, "while not dispositive of the issue, the 97 nonmembers could not have affected the overwhelming vote in favor of affiliation." Id.

In a concurring opinion, one member of the majority agreed with the result solely because he concluded that the question of affiliation "is a matter of exclusive concern to the union members . . . so long as the union did not improperly deny membership to [any] employees." Id. at 1197 (Member Truesdale, concurring). Member Jenkins again dissented, maintaining that the exclusion of nonmembers established that the election "did not meet the minimum strictures of due process." Id. He also claimed that the majority's reliance upon the fact that interested employees could join the union if they wished to vote ignored the employees' section 7 rights to refrain from union activity. Id. at 1198; 29 U.S.C. § 157. Member Penello also dissented, but upon different grounds. He maintained that the affiliation of a 382-member independent with a 200,000-member international "resulted in a substantial change in the identity of the employees' bargaining representative." Id. This change raised a "question concerning representation," which only a Board-conducted election, open to all employees, could resolve. Id.

The company's subsequent appeal to the Fifth Circuit resulted in a further remand of the case to the Board. *Amoco Production Co. v. N.L.R.B.*, 613 F.2d 107, 103 LRRM 2810 (5th Cir. 1980). The court noted that, un-

der established precedent, the employer had no duty to bargain with the post-affiliation entity unless the entity was a valid successor to the independent union. Id. at 110. Successorship status turns upon whether the new entity is " 'a continuation of the old union under a new name or . . . a substantially different organization?' " Id. at 112, *quoting J. Ray McDermott & Co. v. N.L.R.B.*, 571 F.2d 850, 98 LRRM 2191 (5th Cir. 1978), cert. denied, 439 U.S. 893, 99 LRRM 2657. The court then questioned the factual basis for the Board's conclusion, in its initial opinion, that there was a valid successorship established, id. at 110-11, and noted that the Board's second decision contained no discussion of the successorship issue, id. at 111. The court concluded that, because it could not determine why the Board had decided that the international was a successor union, the court would remand the decision to the Board to make a factual determination of successorship.

On remand for consideration of the successorship issue, the Board, instead, changed its position concerning the ability of a certified union to exclude nonmember employees from an affiliation election. The Board majority, in a three-to-two decision, labeled the exclusion issue a "threshold question . . . for, if the affiliation election were improper, the question of successorship would be moot." *Amoco Production Co.*, 262 NLRB 1240, 1241, 110 LRRM 1419 (1982). The Board then determined that basic notions of due process required that affiliation elections to open to all employees, including nonmembers. Id. The Board reasoned that the question of affiliation is not a solely internal union matter because, after affiliation, the union will inevitably call upon the Board either to find an unfair labor practice if the employer refuses to bargain or to amend the union's certification. The concomitant invocation of Board processes requires the Board to assure that the election meets due process requirements. Id. The Board equated the affiliation deci-

sion with the initial certification process and declared that affiliation differs from such internal matters as strike votes and contract ratifications because only the affiliation decision "directly impacts upon matters within the breadth of the Act and results in an undermining of the Board's own election and certification procedures." Id. The Board asserted that the opportunity for nonmember employees to join the union before the election did not satisfy due process because section 7 of the Act gives employees the right to refrain from union activities. Id. Finally, as to the argument that inclusion of all employees would not have changed the outcome, the Board repeated Member Jenkins' dissent from the first decision in the case: "the effects of the exclusion cannot be measured by a mere numerical tally." Id. n.12. In conclusion, the Board declared that the employer did not commit any unfair labor practice by refusing to bargain with the post-affiliation union and held that due process requires that an affiliation election be open to all employees. Id. at 1241.

The two dissenters reasserted the rationales proffered in the first two Board decisions in the case. First, noting that it was the union's internal rule to require membership as a prerequisite to being able to vote in an affiliation election, the dissenters continued to maintain that such an election is an internal union matter in which the Board should not interfere. *Id.* at 1242 (Members Fanning and Zimmerman, dissenting). They also claimed that the matters previously recognized as internal, such as contract ratifications and strike votes, have at least as much impact upon nonmembers as an affiliation election, and yet the majority did not even question the exclusion of nonmembers in those situations. Id. The dissenters saw no tension between the exclusion of a nonmember and an employee's section 7 right to refrain from union activity: "If he has not joined, and was not unfairly barred from doing so, he is responsible for his own dis-

enfranchisement." Id. If he has demonstrated no interest in internal union affairs by not joining, then the union should have no obligation to "solicit his views" concerning affiliation. Id. The dissenters maintained that the unionized employees are those most affected by an affiliation and that any effects upon nonmembers are indirect. They again noted that the outcome would not have changed had the nonmembers had the opportunity to vote. Id. at 1243 n.21.

The Fifth Circuit affirmed the Board's order. *Local Union No. 4-14, Oil Workers International Union v. N.L.R.B.*, 721 F.2d 150, 114 LRRM 3676 (5th Cir. 1983). Initially, the court acknowledged that " 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees.' " Id. at 153, *quoting N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330, 19 LRRM 2128 (1946). The court also remarked that the Board's collective experience could justify a change in its position. The court then noted the Board's prior vacillations on the issue and found "clearly articulated reasonable grounds" for the Board's new position. Id. The court concluded:

> [W]e are unable to say that the general feeling that now requires the participation of nonunion members in an affiliation election is irrational or inconsistent with the Act, or that it is beyond the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representatives of all the employees.

Id. at 152-53.

III. THE NINTH CIRCUIT DECISION

The United States Court of Appeals for the Ninth Circuit has held, in a two-to-one decision, that the *Amoco* rule is irrational and inconsistent with the Act. *Finan-*

cial Institution Employees, Local No. 1182 v. N.L.R.B. 752 F.2d 356, 116 LRRM 3409 (9th Cir. 1984) (*F.I.E.*), *rehearing denied*, 750 F.2d 757, 118 LRRM 2208, *cert. granted*, 105 S.Ct. 2318 (1985). In the *F.I.E.* case, an independent union sought affiliation with an international union, with the affiliation vote confined to union members. Only 2,624 of the 4,800 unit employees were union members. Of the union members, only 1,980 voted; 1,206 voted for affiliation and 774 voted against it. After finding continuity between the pre- and post-affiliation unions, the Board amended the union's certification. *Seattle-First National Bank*, 241 NLRB 751, 100 LRRM 1564 (1979). When the employer then refused to bargain the Board found the employer guilty of an unfair labor practice. *Financial Institution Employees*, 245 NLRB 700, 102 LRRM 1368 (1979). After the Board adopted its new *Amoco* rule, however, it reversed itself in this case as well. Reasoning that the exclusion of nonmembers violates fundamental due process standards, the Board revoked the amended certification and dismissed the unfair labor practice charge against the employer. *Seattle-First National Bank*, 265 NLRB 426, 111 LRRM 1637 (1982).

The Ninth Circuit reversed, noting that, prior to *Amoco*, the Board had undertaken two inquiries when examining affiliation election. First, the Board had always required that unions conduct the elections with sufficient due process protections to ensure that the results accurately reflected the wishes of a majority of the *union* members. 752 F.2d at 360-61. The new rule now requires, as a threshold due process requirement, that *all employees* participate, thereby importing a consideration of the nonmembers' section 7 rights into the due process inquiry. Id. The second inquiry, not altered by *Amoco*, is whether there is a continuity of representation between the pre- and post-affiliation unions, an inquiry which addresses the section 7 interests of both members and non-

members. Id. at 361. If continuity exists, then the Board has traditionally considered an affiliation to be an internal union affair. Id.

The court disapproved of the *Amoco* rule for three reasons. First, it held that the "rule violates a long-standing federal policy avoiding unnecessary interference in internal union affairs." Id. at 362. The court's reasoning on this issue was somewhat confusing. At the outset of its opinion, the court rejected the Board's assertion that affiliations are rarely simply internal matters, stating that some affiliations have such minimal effect upon nonmembers that they could be nothing but internal union affairs, while conceding that others have significant external effects upon nonmembers. Id. n.9. The difference in effect usually depends upon the amount of authority ceded to the international, which is the subject of the continuity inquiry. Id. Nevertheless, because the continuity inquiry adequately protected nonmembers' rights, the court determined that "all affiliation decisions [are] internal union affairs." Id. The court conceded that the Board could interfere with internal matters *if* the questioned union rule "significantly impinges on a policy of the NLRA." Id. The court also conceded that the Board could interfere with internal matters *if* the questioned union rule "significantly impinges on a policy of the NLRA." Id. at 363. The court then concluded that the *Amoco* rule interferes with an internal union practice that impairs no statutory labor policy: "Under the new rule, by requiring a unit-wide vote even when continuity exists between a pre- and post-affiliation union, the Board inevitably interferes in internal union affairs without justification." Id. at 364.

Second the court concluded that the new rule contravenes "the strong national policy of maintaining stability in the bargaining representative to achieve the NLRA's primary purpose preserving industrial peace." Id. The Board contrasted, for example, the Board's section 9(c)

decertification procedures, under which the Board will not consider a decertification petition unless at least thirty percent of the employees sign the petition. 29 C.F.R. § 101.18, with the new rule, which effectively decertifies the post-election union without any examination "into the character of the union or its support among employees." Id. at 365. The *Amoco* rule thus allows an employer to avoid a contract, without any indication that the union has lost its majority status, if the union affiliates without the participation of all employees.

Finally, the court held that the new rule is irrational for two reasons. First, the previous procedures adequately protect both all employees' rights to be represented only by an entity approved by a majority of the unit's employees and union members' rights to run internal affairs without outside interference. Id. at 366. The continuity requirement adequately protects nonmembers' section 7 rights, and, if a sizeable percentage of the employees become disenchanted, they retain the right to petition for decertification. Id. Second, the court determined that the Board's notions of "fundamental due process" for all employees does not support the new rule. Id. at 367. Previously, the due process inquiry only looked at the effect of voting procedures upon union members' rights to manage internal union affairs, while the continuity inquiry protected nonmembers' rights. Furthermore, the court maintained, the new rule is duplicative because, if the Board determines after an *Amoco*-imposed unit-wide election that there is a question of continuity raised by the affiliation, the Board would then conduct a formal unitwide representation election. Id. Finally, the court found unpersuasive the Board's contention that, because affiliations usually result in amendments to certifications, the integrity of Board processes would be questioned without the new rule. The court "fail[ed] to see how imposing a non-Board-supervised election, even when no representation question

arises, enhances the integrity of the Board's certification and election procedures." Id. (footnote omitted).

In dissent, Judge Wright found the new rule neither irrational nor inconsistent with the Act. Id. at 368 (Wright, J., dissenting). The judge relied upon the Fifth Circuit's opinion, a desire to avoid an "unwarranted" intercircuit conflict over the rationality of the Board's decision, and the broad deference due to the Board. Id. at 368-69. For similar reasons, six judges dissented from the subsequent denial of the employer's petition for rehearing with suggestion for rehearing en banc. *Financial Institution Employees, Local No. 1182 v. N.L.R.B.*, 750 F.2d 757, 118 LRRM 2208 (9th Cir. 1984).

The Supreme Court has granted the separate petitions for certiorari filed by the Board, *N.L.R.B. v. Financial Institution Employees, Local 1182*, No. 84-1493, 53 LW 3799 (1985), and the employer, *Seattle-First National Bank v. Financial Institution Employees, Local 1182*, No. 84-1509, 53 LW 3799 (1985). Despite the Supreme Court's decision to grant certiorari, however, we have determined, for two reasons, to resolve the present dispute at this time. First, our decision might finally resolve this case should the parties seek no further review, thus making further delay unnecessary. Second, it is conceivable that the Supreme Court might not resolve the precise issue before us. Significantly, the question raised in the present case with respect to the Board's failure to impose an outcome determinative limitation upon the *Amoco* rule is wholly absent from the *F.E.I.* case. In the latter case, the number of employees excluded from the vote vastly exceeded the margin of victory by which the affiliation election carried. Thus, even if the Supreme Court were to agree with the Board's position in the *F.I.E.* case, we would still have to determine whether the Board's decision not to apply the out-

come determinative test to affiliation elections is justifiable.

Finally, we note that the validity of the *Amoco* rule is also presently before the United States Court of Appeals for the District of Columbia Circuit. *United Food and Commercial Workers International Union Local 568 v. N.L.R.B., petition for review docketed,* No. 84-1243 (D.C. Cir. June 14, 1984) (reviewing *F.W. Woolworth Co.*, 268 NLRB 805, 115 LRRM 1120 (1984)).

IV. THE INTERNAL UNION AFFAIR ISSUE

Petitioner contends that a merger election is an internal union affair. Traditionally, the Board, with court approval, has taken a deferential approach to internal union affairs, intervening only when a particular procedure does not meet "adequate due process standards." *See, e.g., United Steelworkers v. Sadlowski,* 457 U.S. 102, 110 LRRM 2609 (1982) (campaign contributions by nonmembers in election of union officers); *N.L.R.B. v. Boeing Co.*, 412 U.S. 67, 83 LRRM 2262 (1973) (union discipline); *Scofield v. N.L.R.B.*, 394 U.S. 423, 70 LRRM 3105 (1969) (limits on piece work); *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 65 LRRM 2449 (1967) (union discipline); *Amoco Production Co.*, 262 NLRB at 1241 (Board distinguishes affiliations from strike votes, contract ratifications, and choice of contract negotiators, into which, the Board concedes, it normally would not intrude). In its *Amoco* decision, however, the Board determined that an affiliation election is not a solely internal union matter because of its impact upon the Board's certification process. We must determine whether the Board's characterization of affiliation and merger elections is sustainable.

Our appellate function in the present case is a narrow one. The Act confers upon the Board the authority to implement and interpret the Act. *See N.L.R.B. v. Insurance Agents' International Union,* 361 U.S. 477, 499,

45 LRRM 2704 (1960). Thus, as long as the Board's explication of a rule "is not inadequate, irrational or arbitrary," we must sustain its position. *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236, 53 LRRM 2121 (1963). As the Supreme Court has recently stated, in an analogous context, if the Act

> has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> . . . Sometimes the legislative delegation [of authority] to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies. . . ."

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2782-83 (1984) (footnotes omitted), *quoting United States v. Shimer*, 367 U.S. 374, 382 (1961).

The present case requires just such a reconciliation of conflicting statutory policies. The parties agree that the two fundamental labor policies involved are, first, stability in bargaining relations and industrial peace and, second,

free choice and majority rule in the determination of a unit's bargaining agent. *See N.L.R.B. v. Food Employers Council, Inc.*, 399 F.2d 501, 504, 69 LRRM 2077 (9th Cir. 1968). The act includes a number of provisions designed to limit labor strife and instability. E.g., § 8(b)(7)(A), 29 U.S.C. § 158(b)(7)(A) (prohibits recognitional picketing where unit employees already are represented by a recognized union); § 8(b)(7)(B), 29 U.S.C. § 158(b)(7)(B) (bars recognitional picketing for one year after a valid election); § 9(c)(3), 29 U.S.C. § 159(c)(3) (prohibits election in unit that has had an election within previous year). *See generally N.L.R.B. v. A. J. Tower Co.*, 329 U.S. at 331. The Board has adopted a number of other rules to achieve the same end. *Brooks v. N.L.R.B.*, 348 U.S. 96, 35 LRRM 2158 (1954) (Board may invest union with an irrebuttable presumption of majority status for one year after certification); *Pioneer Inn Associates v. N.L.R.B.*, 578 F.2d 835, 839, 99 LRRM 2354 (9th Cir. 1978) (upholding "contract bar" rule that Board will not conduct decertification election during life of contract even if majority of employees withdraws support from union); 29 C.F.R. § 101.18 (1984) (decertification petition requires support of at least thirty percent of employees). The *Amoco* rule implicates the stability policy by threatening to destroy an established bargaining relationship.

The interest in employee free choice of bargaining representatives is also one of the fundamental policies underlying the Act. For instance, section 7 states:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities* . . .

29 U.S.C. § 157 (emphasis added). Furthermore, section 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

29 U.S.C. § 159(a). The exclusive character of the bargaining representative requires the union to represent the interests of these employees who choose to exercise their section 7 right to refrain from union activities. *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. at 180. The impact of the *Amoco* rule upon the free choice interest is obvious.

An affiliation or merger election limited to union members presents particularly acute tensions between these conflicting policies. If the Board refuses to amend its certification or find an unfair labor practice should an employer refuse to bargain with the post-merger entity, it is most likely that the bargaining relationship will cease. On the other hand, if the Board permits the post-merger entity to represent all unit employees upon the basis of an exclusive election, a substantial possibility exists that a majority of the unit-wide work force would not favor that representation. To resolve the tensions presented by merger cases, the Board has resorted to a two-part test, as delineated above. First, the Board inquires whether the election procedures included adequate due process safeguards. Second, if the procedures are sufficient, the Board determines whether continuity exists between the pre- and post-merger organizations. The present case concerns only the first step of the Board's inquiry: As a matter of due process, *Amoco* requires a union to allow all employees in a bargaining unit to vote in the merger election.

Preliminarily, petitioner contends that, because the *Amoco* rule represents an allegedly sharp change of agency course, the agency "bears the burden of fully justifying the necessity for its shift in position." In support of its contention, the union cites *Atchison, Topeka & Santa Fe Ry v. Witchita Board of Trade*, 412 U.S. 800 (1973), in which the Court stated that an agency must clearly explain its departure from a "settled course of behavior." Id. at 807-08. Yet, as the history of the *Amoco* case demonstrates, *see* Part II, *supra*, the Board's approach to the affiliation issue has been anything but settled. In an effort to resolve an unsettled area of its jurisprudence the Board has now established its *Amoco* rule. As the United States Court of Appeals for the Ninth Circuit has stated, with reference to an area as fraught with indecision as is the affiliation issue, "the Board may alter its standards provided that its new rules are both rational and consistent with the Act." *N.L.R.B. v. Best Products Co.*, 765 F.2d 903, 118 LRRM 3265, No. 84-7645, slip op. at 15 (9th Cir. July 10, 1985). Thus, as long as the *Amoco* rule is rational and consistent with the Act, we will uphold it notwithstanding that the new rule resolves an unsettled area of union election law.

To comply with the limited review mandated by *Chevron*, *see* page [17a], *supra*, we must give special deference to Board rules related to the choice of a bargaining representative: "as a matter of policy 'the soundness of an election rule is not the business of the reviewing court.'" *N.L.R.B. v. Tom Wood Datsun, Inc.*, 767 F.2d 350, 119 LRRM 3415, No. 84-2264, slip op. at 5 (7th Cir. July 11, 1985), *quoting Mosey Manufacturing Co. v. N.L.R.B.*, 701 F.2d 610, 615, 112 LRRM 2822 (7th Cir. 1983) (en banc). Petitioner contends that the *Amoco* rule is not an election rule, but is, instead, an unwarranted intrusion by the Board into an internal union affair. Included in petitioner's contention, however, is a presupposition that a merger is an internal union affair. Yet, that is precisely the question presented by this petition. The *Amoco* rule

that a merger is not a solely internal union affair represents a balancing of the stability and free choice interests. We must determine whether the Board's balancing of the interests and conclusion that mergers are not solely internal union affairs reflect a reasonable construction of the Act. *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 501, 98 LRRM 2727 (1978).

In Board-conducted representation elections, the Board has delineated a fairly elaborate set of procedures to be followed. In *Amoco*, the Board has merely redefined what it will consider to be adequate due process in the context of union-run merger elections. As a matter of internal union structure, a merger is virtually indistinguishable from other matters that the Board holds to be internal union affairs; a merger affects the relationship between a union and its members in such the same way as contract ratifications and elections of union officers. In one crucial aspect, however, a merger election differs from the other internal union affairs: Its effects are not limited to the relationship between a union and its members. Instead, it has external ramifications. For example, after an affiliation or merger, a union inevitably seeks an amendment to its certification, as in *Amoco*, or files unfair labor practice charges with the Board, as in the present case. Thus, because petitioner invoked the external authority of the Board in an attempt to establish that the employer had committed an unfair labor practice, the Board could rationally require an additional indicium of unit-wide majority support for the merger, while avoiding the imposition of the entire set of procedures required in a Board-conducted election. The additional indicium that *Amoco* requires is that all unit employees have the opportunity to vote.

We consider *Amoco's* limited procedural imposition upon the union's ability to conduct an election to be a rational balancing of the conflicting interests in stability and free choice. Furthermore, the imposition of the unit-

wide eligibility requirement reconciles the union's dual status as a voluntary organization and as a certified or recognized bargaining agent. See R. Williams, *NLRB Regulation of Union Bargaining Rights when Affiliation Changes* 24 (U. Pa. 1982). We do not suggest that *Amoco* is the only rational balance that the Board could have reached. The Board's pronouncements are not subject to such an exacting standard. We hold only that the Board's conclusion that a merger election is not a solely internal union affair is rational, consistent with the Act, and not arbitrary.

We decline to agree with the approach adopted by the Ninth Circuit in the *F.I.E.* case for much the same reasons that Judge Wright offered in his dissent from that opinion. The majority in *F.I.E.* set forth three reasons for rejecting *Amoco*. First, the rule unnecessarily interferes with internal union affairs. 752 F.2d at 362-64. As we have just concluded, however, we find that the Board's holding that a merger is not a solely internal union affair is rational and consistent with the Act. See id. at 368-6 (Wright, J., dissenting). Second, the Ninth Circuit found that the rule contradicted the policy of promoting stability in the bargaining representative. Id. at 364-66. Yet, as Judge Wright noted, *Amoco* will not increase instability because, "[u]nder the new rule, nonmembers may not force affiliation [or merger] because the decision to hold an affiliation election remains the province of the union. The Board's rule will promote stability more effectively than did its former position." Id. at 369 (Wright, J., dissenting). (As we point out subsequently herein the firm establishment of the *Amoco* rule, if followed by unions, might result in less post-merger litigation, and less industrial instability, than under prior Board approaches). Finally, the *F.I.E.* majority asserted that the new rule was irrational because previously followed procedures adequately protected all relevant interests. Id. at 366. On this issue, we find ourselves in complete agreement with Judge Wright: "The

adequacy of the old procedure is irrelevant. We should instead determine whether the new rule is rational and consistent with the Act. The merit or sufficiency of the previous rule should not control." Id. at 369 (Wright, J., dissenting).

Because a merger election is not solely internal, the Board was free to pass upon the propriety of the election procedures followed by the union. Its determination that all unit members must vote before it will sanction the results of an affiliation election is a reasonable accommodation of the conflicting policies present in this case. Consequently, we must sustain the Board's action in this case, provided that we reject petitioner's next claim.

V. THE OUTCOME DETERMINATIVE TEST

Petitioner claims that, even if we sustain the Board's universal suffrage requirement, we must reverse the Board's disposition of this case because of the failure of the Board to apply an outcome determinative limitation to the *Amoco* rule. Petitioner notes that, in Board-conducted representation elections, the Board will not overturn the election results unless the alleged errors in tabulation or voting procedures could have affected the outcome. *See N.L.R.B. v. Speedway Petroleum, Division of Emro Marketing Co.*, 768 F.2d 151, 119 LRRM 3366, No. 84-2838, slip op. at 4 (7th Cir. July 17, 1985). Because a merger election is, in effect, a substitute for a representation election, which explains the Board's involvement in the regulation of merger elections, see Part IV, supra, petitioner asserts that the Board must apply the same outcome determinative test. Furthermore, petitioner claims that the Board failed to offer "any explanation of consequence" for refusing to apply the limitation.

Petitioner's final contention is clearly without merit. The Board did proffer a justification for its refusal to apply an outcome determinative limitation when it an-

nounced the *Amoco* rule. The justification was that "the effects of the exclusion cannot be measured by a mere numerical tally." 262 NLRB at 1241. Surely, this view is a rational assessment of the effects of a group exclusion upon the outcome of an election. With the knowledge that the union has forbidden them from voting, nonmembers have little incentive to air their views about the merits of a merger. Consequently, conflicting analyses of the proposed merger remain unarticulated. The resultant distortion of the election atmosphere easily could affect the votes of union members; exposure to conflicting views could either spur otherwise abstaining members to vote or convince voting union members to change their minds. Either way, the presentation of alternative opinions might lead union employees to adopt the viewpoints presented by non-union unit members and thus extend the influence of the non-union employees beyond their numerical representation within the bargaining unit. Although the contexts are different, we find that the pronouncements of the Supreme Court relative to group exclusions from jury service capture the manner in which group exclusions from an election can have effects greater than the mere number of excluded voters. *See, e.g., Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (opinion of Marshall, J.) (exclusion of blacks for jury service "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented"); *Ballard v. United States*, 329 U.S. 187, 193-94 (1964) (exclusion of women from juries eliminates "the subtle interplay of influence" from the jury room).

Even apart from the effect of the exclusion of nonmembers upon the conduct of union employees, we hesitate to endorse the election of a union that has deliberately disenfranchised an entire group of otherwise eligible voters. Notions of participatory democracy lie at the very center of the Act, and full participation is impossible to achieve if entire segments of a given electorate do not receive the opportunity to vote. Consequently, we consider the

Board's statement that "the effects of the exclusion cannot be measured by a mere numerical tally" to be an "explanation of consequence" for the rule.

Petitioner's argument that the fact that the Board applies an outcome determinative test to its own representative test to its own representation elections somehow renders irrational the Board's decision not to apply the same test to union-run merger elections is also without merit. Petitioner correctly asserts that the product of both a Board representation election and a union affiliation election is the same: to determine an exclusive bargaining representative. Yet, there is no logical reason why the Board must analyze the results of the two types of elections in an identical fashion, just as there is no requirement that the entity running the election must observe the same procedures. We have described above how the procedures required in an election depend upon whether the Board or the union runs the election. Rather than requiring unions to conform to all the procedural safeguards found in a Board-run election, the Board only requires that the union provide every employee an opportunity to register his or her opinion. It is not fatally inconsistent for the Board to apply different rules to fundamentally different procedures, even though the result of both procedures determines the exclusive bargaining agent for an employee unit.

Further, a significant, apples-oranges, distinction exists between the two types of elections. No group of employees within the appropriate unit is disenfranchised. Those who assert they are in the unit may cast a ballot even though it may be challenged. It is the challenged votes, nevertheless votes, which are not counted if their numbers would not be determinative of the outcome. The several distinctions between the two procedural mechanisms dispose of the contention that the Board must impose the same mode of analysis in both contexts.

According to petitioner, the independent union ceased to exist after the merger. Thus, the decision effectively to void the election would leave the employees without representation, at least temporarily. Petitioner complains about this "draconian" result. If the Board was correct, however, about its resolution of the internal union affairs issue, and we already have held that it was, the petitioner is to blame for not allowing the non-union employees to vote. Although a majority of the unit employees had agreed to representation by the independent, the independent no longer exists. Furthermore, the Board reasonably concluded that, because non-union employees did not vote, no recognizable majority of the union employees had agreed to representation by the post-election entity. Therefore, petitioner cannot invoke Board processes to force the Employer to bargain with it.

Two considerations deprive the allegedly draconian result of much of its sting. First, in the particular employment relationship at issue in the present case, nothing prevents petitioner from attempting to reorganize the Employer's work force. If petitioner succeeds in obtaining an indication of majority support, and the Employer refuses to recognize it, petitioner can compel a unit-wide, Board-conducted election, with binding results. Second, on a systemic level, the *Amoco* rule should result in a decrease in the amount of limitation on merger issues. Under *Amoco*, a union is certain to include all unit employees in a merger vote. If the vote carries, employers faced with certain majority support for the post-merger organization might be dissuaded from further contesting the validity of the merger.

It is on the systemic level that an outcome determinative limitation upon *Amoco* would divest the rule of its efficacy. If a union knew that it could disenfranchise nonmember employees and still have the results stand, provided the margin of victory was greater than the number of disenfranchised employees, there would be some

incentive to continue to exclude nonmembers. If, on the other hand, the majority were not sufficiently large, there would have to be a unit-wide election, again run by the union. Even after such an election, if the question of the continuity of the post-merger union arose, a third election, this one conducted by the Board, would take place. The Board's refusal to impose an outcome determinative limitation eliminates the incentive for a union to gamble by disenfranchising the nonmember employees in the first instance. As such, the Board's refusal to limit *Amoco* rationally implements the fundamental NLRA policy of employee democracy.

IV. CONCLUSION

We have considered all the arguments of petitioner and find them to be without merit. Accordingly, the petition for review is Denied.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 13-CA-21660 and 13-CA-21696

MAY DEPARTMENT STORES COMPANY, VENTURE STORES DIVISION *and* UNITED RETAIL WORKERS UNION LOCAL NO. 881, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

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17 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

Upon charges and an amended charge filed by United Retail Workers Union, Local No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued an order consolidating cases, and a consolidated complaint and notice of hearing on 18 December 1981, against May Department Stores Company, Venture Stores Division, herein called the Respondent. The complaint alleges that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7)

of the National Labor Relations Act, as amended. Copies of the charges and the consolidated complaint and notice of hearing were duly served on the parties. The Respondent filed an answer to the complaint, denying that it had committed any unfair labor practices.

Thereafter, the Respondent, the Union, and counsel for the General Counsel entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and a decision and order. The parties stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision. The parties also agreed that no oral testimony was necesasry or desired by any of the parties, and that the charges, the complaint, the answer, and the stipulation of facts, including attached exhibits, constituted the entire record in the case. The parties, however, reserved the right to object to the materiality, relevancy, or competence of any of the stipulated facts.

On 23 April 1982 the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel, the Respondent, and the Union filed briefs which have been duly considered by the Board.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record herein as well as the briefs filed by the parties, and makes the following

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[1] The Respondent filed a "Motion To Supplement the Record," the General Counsel filed a motion in opposition to the Respondent's motion, and the Respondent filed a reply to the General Counsel's opposition. In view of our disposition herein, we deny these motions, as this additional evidence would have no effect on the outcome of this proceeding.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

May Department Stores Company, Venture Stores Division, is a Delaware corporation engaged in the retail sale and distribution of general merchandise at various store locations in the States of Illinois and Indiana, with its offices and principal place of business located at St. Ann, Missouri. During the 1981 calendar year, a representative period, the Respondent, in the course and conduct of its business, derived gross revenues in excess of $500,000 and received in excess of $50,000 from retail sales within the States of Illinois and Indiana, of general merchandise, which it purchased and caused to be transported to the States of Illinois and Indiana directly from points located outside those States.

The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

United Retail Workers Union and United Food and Commercial Workers International Union, AFL-CIO, CLC, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

In 1978, the Respondent recognized United Retail Workers Union (URW) as the collective-bargaining representative of its employees in the following unit:

> (a) All employees employed in Respondent's operations at the following locations: 1) 9449 Skokie Boulevard, Skokie, Illinois; 2) 116 South Waukegan, Deerfield, Illinois; 3) 444 East Rand Road, Arling-

ton Heights, Illinois; 4) 521 East North Avenue, Glendale Heights, Illinois; 5) 125 West 87th Street, Chicago, Illinois; 6) 11440 South Halsted Street, Chicago, Illinois; 7) 7601 South Cicero Avenue, Chicago, Illinois; 8) 6063 Broadway, Merriville, Indiana; 9) 1311 Golf Road, Schamburg, Illinois; and 10) 1740 North Kostner, Chicago, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said stores, but who are not part of the facility's normal employee complement. [Hereinafter the Chicago stores.]

(b) All employees employed in Respondent's operations located at 2800 North Water Street, Decatur, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said store, but who are not part of the facility's normal employee complement. [Hereinafter the Decatur store.]

The Respondent and the URW entered into their initial collective-bargaining agreement for the Chicago stores in June 1978, and for the Decatur store in July 1978. The most recent collective-bargaining agreement for the Chicago stores is effective by its terms from 21 July 1980 through 24 July 1983. The most recent collective-bargaining agreement for the Decatur store is effective by its terms from 1 January 1981 through 31 December 1983. The Respondent terminated both agreements effective 1 November 1981.

B. *The Union Affiliation Election*

In June 1981, the presidents of URW's four locals unanimously agreed to seek affiliation with United Food and Commercial Workers International Union, AFL-CIO, CLC (UFCW). During July 1981, URW held meetings for the membership of its local unions regarding the proposed affiliation. Each meeting was open to all URW members.[2]

The following individuals were eligible to vote in the affiliation election:

(a) All active URW members on the payroll of an employer under contract with URW as of the last payroll date prior to 31 July 1981; and

(b) Nonmembers employed by an employer under contract with URW as of the last payroll date prior to 31 July 1981: (1) who had not completed but would complete their 30-day probationary period before 31 July and (2) from whom URW had received a membership application before 31 July 1981.

On or about 31 July 1981 Walenzę Direct Mail, on behalf of URW, mailed instructions and ballots for a mail ballot referendum on the affiliation to 20,548 individuals fitting the eligibility requirements. Of this number, 9,235 ballots were timely returned and tabulated. The results showed that 6,823 votes were cast for, and 2,344 against, affiliation. There were 68 invalid votes.[3]

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[2] As of 31 October 1981, the 4 locals of URW represented approximately 22,400 employees, of whom approximately 20,500 were URW members.

[3] The Respondent has approximately 1,292 unit employees, 1,214 of whom were eligible to vote. Of the ballots sent to Respondent's employees, 389 were returned and tabulated. No determination of how these ballots from employees in either of the two units herein were cast is available.

On or about 21 August 1981 officials of URW informed Respondent of the results of the mail ballot referendum. In subsequent correspondence Respondent agreed to honor its bargaining agreements with URW until 1 November 1981, the date UFCW granted a charter to URW as its Local No. 881.

C. *The Respondent's Refusal to Bargain*

Since on or about 1 November 1981 the Respondent has:

(a) Refused to recognize and bargain with Local No. 881 as the exclusive collective-bargaining representative for the employees of its Chicago and Decatur stores.

(b) Refused to process grievances with Local No. 881 arising on or after 1 November 1981 in accordance with article IX of the current collective-bargaining agreements.

(c) Refused to grant Local No. 881 representatives access to its stores for purposes of administering the collective-bargaining agreements in accordance with section 8.5 of the current collective-bargaining agreements.

(d) Refused to transmit to Local No. 881 union dues and initiation fees as called for by section 8.2 of the current collective-bargaining agreements.

(e) Refused to enforce the union membership requirement relative to Local No. 881 as set forth in section 8.1 of the current collective-bargaining agreements.

(f) Refused to submit the names and addresses of new hires in accordance with section 8.1(D) of the current collective-bargaining agreements.

CONCLUSIONS OF LAW

We find merit in Respondent's contentions that the election herein was conducted with insufficient due process safeguards. As announced in *Amoco Production Co.*,

262 NLRB 1240 (1982), a critical element of an affiliation election is that all unit employees, whether union members or not, be permitted to participate and vote in the affiliation election. Because, in this case, all unit employees have not been accorded these rights, we find that the affiliation was improper. The Respondent, therefore, did not violate Section 8(a)(5) and (1) of the Act when it refused to bargain with United Retail Workers Union Local No. 881, chartered by United Food and Commercial Workers Union, AFL-CIO, CLC, and refused to comply with the provisions of the collective-bargaining agreements noted therein in effect with United Retail Workers Union, as they would apply to Local No. 881.

ORDER

The National Labor Relations Board orders the consolidated complaint dismissed.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-479

UNITED RETAIL WORKERS LOCAL 881,
Applicant,

v.

NATIONAL LABOR RELATIONS BOARD and
MAY DEPARTMENT STORES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28, 1986.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of December, 1985.

APPENDIX D

The National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, provides in pertinent part as follows:

Sec. 8, 29 U.S.C. § 158:

(a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9, 29 U.S.C. § 159:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer de-

clines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1446

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED RETAIL WORKERS UNION LOCAL 881, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND MAY DEPARTMENT STORES CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982), the Board ruled that an independent union that affiliates with a large international organization is not entitled to continued recognition as statutory bargaining representative unless (1) all employees in the bargaining unit, not just union members, are given an opportunity to vote on the change, and (2) there is substantial continuity of representation between the pre-and the post-affiliation representative. In the instant case the United Retail Workers Union (URW), an independent union, was the statutory bargaining representative of employees employed by the Venture Stores Division of May Department Stores Company. URW affiliated with the United Food and Commercial Workers International Union (UFCW). The Board applied

its *Amoco* rule and held that the post-affiliation organization (UFCW Local 881) was not entitled to continued recognition as the employees' statutory bargaining representative because some unit employees were not permitted to vote in the affiliation election because they were not union members (Pet. App. 33a-34a). As a result, the Board dismissed the refusal to bargain complaint against the company without determining whether there was substantial continuity between the URW and UFCW Local 881. The court below upheld the *Amoco* rule and approved its application in the instant case.

2. In *NLRB* v. *Financial Institution Employees, Local 1182*, No. 84-1493 (Feb. 26, 1986), slip op. 16 (footnote omitted), this Court held "that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." The Court noted, however, that it did not mean to suggest "that other Board representation procedures, such as its continuity determination, exceed its statutory authority." Slip op. 16 n.13.

3. Because the Court has recently disapproved the unit-wide vote requirement applied by the Board and approved by the court below in this case,* the Court should vacate the judgment below and remand the case to the court of appeals with instructions to remand it to the Board for further proceedings in light of *NLRB* v. *Financial Institution Employees, Local 1182, supra*. See *Bachrodt Chevrolet Co.*

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*The Court noted in *Financial Institution Employees* (slip op. 4) that the holding of the Ninth Circuit which it there affirmed was in conflict with the holding of the Seventh Circuit in this case.

v. *NLRB*, 411 U.S. 912 (1973); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Respectfully submitted.

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APRIL 1986